No. [redacted] 42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

CAPITAL GAINS RESEARCH BUREAU, INC., and HARRY P. SCHWARZMANN

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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CITATIONS.

STATUTES AND RULES.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner seeks a review of an interlocutory order affirming an order of the United States District Court for the Southern District of New York denying an injunction *pendente lite* (in an action commenced over two years ago) for failure of proof to warrant a preliminary injunction. A panel of the Circuit Court had previously affirmed.

Opinions Below.

The opinion of the Court of Appeals *en banc* is reported at 306 F. 2d 606. The petition correctly cites the decisions of the Circuit Court panel and of the District Court.

Reference to Appendix of Appellees in Circuit Court is designated "Resp. R". Nine additional copies are being filed herewith. Reference to Securities and Exchange Commission Appendix is designated "R".

Question Presented.

Should this Court review the denial of an injunction *pendente lite,* for lack of sufficient proof to warrant a preliminary injunction, for alleged violation of Section 206(1) and (2) of the Investment Advisers Act of 1940—where the preliminary injunction has been denied by the District Court, affirmed by a panel of the Circuit Court, and the Circuit Court *en banc*—and where the action was commenced over two years ago and the petitioner has failed to proceed to trial on the merits.

Decisions of the Courts Below.

The Circuit Court *en banc* held:

> "The only question presented at this stage of the proceedings, namely, an application for a preliminary injunction in advance of a trial upon the merits, is whether a violation of Section 206 (1) and (2) has been so clearly established that defendants are, in effect, to be found at fault without awaiting the development of all the facts upon a trial." (306 F. 2d 606, 608)

> "* * * There is no proof that defendants employed 'any device, scheme, or artifice to defraud any client or prospective client' or engaged 'in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.'" (p. 609)

> "No proof having been presented under sections 206(1) and (2) sufficient to justify the granting of a preliminary injunction, the order appealed from is affirmed." (p. 611)

The District Court found there was no fraud or deceit and none was intended.

> "There is no proof here that any client * * * lost a single dollar * * * or that defendants intended that any client * * * should * * *.
>
> "* * * there is nothing to indicate that defendants intended anything but maximum profits for their clients * * *." (191 F. Supp. 897, 899)

Statute Involved.

The penal provisions are in T. 15 USC, 80b-17.

> "80b-6. Prohibited transactions by registered investment advisers
>
> "It shall be unlawful for any investment adviser registered under section 80b-3 of this title, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> "(1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> "(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;
>
> "(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any trans-

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T. 15, USC, 80b-6.
Petitioner alleged violations of only Sub. (1) and (2).

action with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction; Aug. 22, 1940, c. 686, Title II, §206, 54 Stat. 852;

"(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission *shall*, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative. As amended Sept. 6, 1960, Pub. L. 86-750, §§8, 9, 74 Stat. 887."

Statement.

There is a substantial dispute as to material facts as related by petitioner.

Harry P. Schwarzmann, or his company, has been a registered investment adviser since 1953 (Resp. R, 6a). Mr. Schwarzmann, a man of good repute, left a substantial position as head of a corporation to organize and build his own business (Resp. R, 3a).

Capital Gains issues two publications. One, "Facts on the Funds", contains solely statistical information of portfolio changes of the leading mutual funds. It was distributed periodically to about twenty thousand subscribers for a fee of $24 per year (Resp. R, 6a).

The other publication, called "A Capital Gains Report", was subscribed to by about five thousand at $18 per annum (Resp. R, 6a). This publication was issued after research of a particular stock, management consultation, giving statistical and analytical data, and generally contains a recommendation to purchase for long-term appreciation (Resp. R, 6a).

The implication of the SEC (adopted by the minority) that bulletins were issued to non-subscribers, sometimes to 100,000, to create buying is absolutely false (Resp. R, 6a). Reason and arithmetic confirm the fallacy of the premise. The cost of issuing 100,000 bulletins (postage, printing, mailing of $7,000-$8,000) would have caused respondents a substantial loss on each of six transactions and a very considerable total loss on the combined total. The bulletins were occasionally issued to non-subscribers, as a sample of research done, to obtain new subscribers, but only some appreciable time after they had been issued to subscribers (Resp. R, 6a).

It is not disputed that the recommendations to subscribers were sound; that, in seven years as an investment adviser, Mr. Schwarzmann had never written on a questionable stock; that each recommendation was carefully selected, thoroughly researched and investigated (Resp. R, 1a). All of the stocks are nationally known and listed on the New York Stock Exchange, save one on the American Stock Exchange. The reports were an unbiased selection made in good faith to provide subscribers an opportunity for long-term capital appreciation (Resp. R, 1a). Subscribers had, in each instance complained of, the opportunity for substantial profit, as shown in the following chart.

Name of Stock	Price When Recommended	Subsequent High	% Increase	% Profit Realized by Capital Gains on its Transactions
Continental Insurance	$48½	$74⅞	54.4%	2.0%
United Fruit	22¾	30½	34.1	8.8
Creole Petroleum	25⅝	42¾	66.8	1.0
Hart, Schaffner & Marx	23	36½	58.7	6.0
Frank G. Shattuck	17	31⅜	84.5	6.8
Union Pacific	25	37⅛	48.5	3.2

There was no proof that the transactions of Capital Gains in any way interfered with the profit that might have been made by any subscriber who followed the recommendation.

There was nothing secret about the Capital Gains transactions. Stocks were openly bought and sold in the name of Capital Gains through member firms of the Exchange (Resp. R, 2a). Capital Gains had no knowledge whether any subscriber followed its recommendations. Nor was there any proof that any subscriber did in fact purchase any stock recommended.

The number of shares purchased by Capital Gains prior to the reports was insignificant compared to the outstanding stock of the companies involved:

	Shares Purchased	Outstanding Shares
Continental Insurance	500	11,998,000
Creole Petroleum	2,000	77,621,000
Union Pacific	2,000	22,439,000
Hart, Schaffner & Marx	600	875,695
United Fruit	5,300	8,733,000
Shattuck	600	1,104,000

Petitioner omitted to state that in two instances (Continental Insurance and Shattuck) Capital Gains purchased shares after issuing the report, as well as before, and in one instance (Creole) had not recommended that the stock be purchased (R, 22, 24).

There was no proof that Capital Gains' recommendations influenced the market; there are hundreds of investment advisers and thousands of brokers who recommend stocks. We know in one instance (Union Pacific) purchase of the stock had been recommended by Standard & Poor's, the largest advisory service, ten days before Capital Gains' recommendations (R, 23). Three leading New York Stock

Exchange houses recommended Continental Insurance after Capital Gains (R, 23).

Petitioners chart on page 5 misstates the facts. It overstates the total profits by about 100%. The profit on Continental Insurance was $89 instead of $1,125; on Creole Petroleum $569 instead of $1,762; on Union Pacific $1,599 instead of $1,757, and on Chock Full O'Nuts a loss of $4,000 instead of a profit of $2,773.33 (R. 23, 25, 24, 22).

This suit was started precipitously after a two-day investigation (Resp. R, 3a). Prior to the suit the SEC was told that, while Capital Gains believed that it had a right to make use of its own research for its own market profit—i.e., to trade in an open market—and had not committed any fraud or deceit, it was nevertheless willing to conform to SEC wishes as to trading or not trading or any form of disclosure of transactions (Resp. R, 1a, 2a, 5a). The practice complained of was thus discontinued without the necessity of this suit, but, regardless, the SEC embarked upon this litigation with trial by ruinous publicity.

The day after the issuance of the order to show cause, before answering affidavits had been submitted, there appeared on the front page of the local paper in Mr. Schwarzmann's hometown the following:

> "According to Henry B. Bright of New York, senior attorney for the SEC, who brought the complaint against Schwarzmann, 'this is the biggest fraud of its kind which we have discovered on the market in the last 10 years.'"

There was other publicity in New York papers on matters not appearing in the moving papers and supplied by SEC (Resp. R, 4a).

Chock Full O'Nuts.

Illustrative of the SEC's failure to prove a scheme to defraud any subscriber and that the real complaint is not that anyone was defrauded but that respondent might profit is this factual situation.

Capital Gains did not recommend either the sale or the short sale of this stock. It had never recommended that its subscribers purchase the stock and had no knowledge whether any subscriber owned a single share (R. 21, 22).

Capital Gains transactions in the stock had no relation to its subscribers. It had also completed transactions in the stock some time before the bulletin. The transactions complained of resulted not in a $2,700 profit, as claimed, but in a loss of $4,000 (R. 22). The bulletin in question was a study as to the relative values of Chock Full O'Nuts and Shattuck (Schrafft's), pointing out that at current prices there was far greater opportunity for profit in Shattuck and recommending it for purchase (R. 21, 22, 35, 36).

Reasons for Denying Writ.

Petitioner, in an action over two years old, is still seeking a preliminary injunction, which has been denied by three courts, to prevent possible "immediate and irreparable injury, loss and damage" to respondents' subscribers prior to a trial on merits (R. 7). Although the case could have been tried long ago, petitioner has made no attempt to proceed to trial.

There is no substantial or important question involved. The decision below does not hinge upon construction of a statute but on failure of proof to warrant a preliminary injunction pending a trial on the merits. The decision is not in conflict with that of any other circuit—nor is it novel.

There was a finding by the District Court of good faith—a lack of intent to defraud, without which there can be no violation of the statute.

Further, there was no proof of injury or probable injury to any of respondents' subscribers—on the contrary, in the instances complained of subscribers could have made, in each instance, on respondents' advice, a capital gain of from 34% to 84%.

In addition, there was no need for a preliminary injunction—the question was moot before the bringing of the action.

1. This Court does not review the denial of a preliminary injunction for failure of proof.

The exceptional power to review an interlocutory order by certiorari is intended to be sparingly exercised, and has never been extended to failure of proof.[1]

The decision of the Court below does not hinge on construction of the statute involved but on a failure of proof.

The decision of the Circuit Court *en banc* said:

> "The only question presented at this stage of the proceedings, namely, an application for a preliminary injunction in advance of a trial upon the merits, is whether a violation of section 206(1) and (2) has been so clearly established that defendants are, in effect, to be found at fault without awaiting the development of all the facts upon a trial." (306 F. 2d 606, 608)
>
> "* * * There is no proof that defendants employed 'any device, scheme, or artifice to defraud any client or prospective client' or engaged 'in any transaction, practice, or course of business which operates as a

[1] *Denver* v. *N. Y. Trust Co.*, 229 U. S. 123, 133 (1912).

fraud or deceit upon any client or prospective client.' " (p. 609)

"* * * No proof having been presented under sections 206(1) and (2) sufficient to justify the granting of a preliminary injunction, the order appealed from is affirmed." (p. 611)

The issuance of preliminary injunctions depend upon the facts in each case. Being episodic, failure of proof provides no special or important reason for review.[2]

2. Under the rule of this Court, findings of the District Court undisturbed by the Court of Appeals are unassailable.[3]

The District Court's finding of good faith and lack of intent to defraud is dispositive of this case.

The District Court found:

"There is no proof here that any client * * * lost a single dollar * * * or that defendants intended that any client * * * should * * *.

"* * * there is nothing to indicate that defendants intended anything but maximum profits for their clients * * *." (191 F. Supp. 897, 899.)

The finding was amply supported by evidence. It is not disputed that the recommendations were sound. In each instance complained of, subscribers had the opportunity for long term capital gains of from 34-84% (*supra*, p. 5). There was no proof that respondent's transactions in the slightest way interfered with the possible profits of the subscriber, nor that the non-disclosure on

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[2] *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 74 (1954).

[3] *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 475 (1938); *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214 (1948).

the transactions was a material fact that did or could operate as a fraud or deceit upon a subscriber.

Fraud is never presumed and must be established by clear, convincing and satisfactory proof.[4]

Intent to deceive or defraud is a necessary ingredient to fraud. *Durland* v. *United States,* 161 U. S. 306, 313, 314 (1895); *United States* v. *Brandt,* 196 F. 2d 653, 657 (1952, 2nd); *Troutman* v. *United States,* 100 F. 2d 628, 632 (1938, 10th) cert. den. 306, U. S. 649[5]; *Rice* v. *United States,* 149 F. 2d 601, 603 (1945, 10th).[5]

Three Courts have found that the petitioner failed to establish proof sufficient to warrant granting a preliminary injunction before a trial on the merits.

3. There was no abuse of discretion in denying the injunction *pendente lite.*

The Court's function in reviewing the grant or denial of a preliminary injunction is limited to the question of whether discretion was improvidently exercised. Discretion is implicit in the decision even if not expressed.[6]

The moving papers sought the preliminary injunction because "immediate and irreparable injury, loss and damage may result to clients or prospective clients" of respondent. (R7).

In addition to finding good faith and lack of intent to defraud without which there can be no violation the Dis-

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[4] *United States* v. *Thompson,* 279 F. 2d, 165, 167 (1960, 10th); *Equitable Life Insur. Co.* v. *Halsey, Stuart & Co.,* 112 F. 2nd, 302, 308 (1940, 7th).

[5] These cases involved fraud provisions of the Securities Act of 1933, 15 U. S. C. 77q.

[6] *United States* v. *Corrick,* 298 U. S. 435, 437 (1936); *Alabama* v. *United States,* 279 U. S. 229, 231 (1929); *Meccano, Ltd.* v. *John Wanamaker,* 253 U. S. 136, 142 (1920).

trict Court found no injury or probable risk of injury to respondent's subscribers.

> "There is no proof here that any client * * * lost a single dollar by reason of the defendant's acts * * * or that defendants intended that any client or prospective client should * * *." 191 F. Supp. 897, 899.

A preliminary injunction should not be issued without need. An injuction is not justified by the fact that a defendant is in a position where he could commit a violation or that plaintiff thinks that he might.[7]

Nor should a preliminary injuuction be granted where its effect is to give final relief before a trial of the issues.[8]

4. This Court will not review the right to a preliminary injunction where the necessity for such relief does not exist.[9]

The suit and preliminary injunction were unnecessary. Prior to the commencement of the suit in November, 1960, when question arose about the transactions, respondents, while asserting no fraud or deceit had been perpetrated, were willing to abide by any suggested practice as to trading or not trading or a disclosure thereof that the S. E. C. deemed advisable! (Resp. R. 2a, 5a, 7a).

Instead of handling the situation as an administrative matter (the Commission has the right to revoke an adviser's registration (T. 15 USC 80b-3(d)), and the practice com-

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[7] *United States* v. *U. S. Steel*, 251 U. S. 417, 445 (1920); *Securities and Exchange Commission* v. *Torr*, 87 F. 2nd, 446 (1937, 2nd).

[8] *Securities and Exchange Commission* v. *Torr, supra*; *United States* v. *Adler's Creamery*; 107 F. 2d, 987, 990 (1939, 2nd); cert. den. 311 U. S. 657.

[9] *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920).

plained of had ceased, the Commission nevertheless on a two-day investigation embarked upon this litigation.

The litigation is over two years old and the Commission is still seeking a preliminary injunction, yet making no effort to proceed on the merits. Petitioner does not deny that the acts complained of ceased.

The purpose of injunction relief is not to punish for past acts, assuming they were unlawful, but in a proper case to prevent future violations.[10] When the acts complained of have ceased, there is no reason for the suit or for injunction, no triable issue, and the case is moot.[11]

5. The petitioner has "unclean hands". The traditional rules of equity apply to actions involving governmental agencies.[12] A seeker of equity must do equity. The day after this action was commenced, not content with publicizing information contained in the moving papers, there appeared on the front page of the local newspaper in the home town of the respondent, the following:

> "According to Henry B. Bright of New York, senior attorney for the SEC, who brought the complaint against Schwarzmann, 'this is the biggest fraud of its kind which we have discovered on the market in the last 10 years.' " (Resp. R. 4a)

This was before respondent had an opportunity to file an answering affidavit, which affidavit has never been contradicted.

Such publicity is contrary to the Investment Advisers Act, T15 USC 80b-10(b), which provides the Commission or employee

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[10] *Walling* v. *Buettner*, 133 F. 2d 306 (1943, 7th).

[11] *Walling* v. *Schenandoah-Dives Mining Co.*, 134 F. 2d, 395 (1943, 10th).

[12] *Alabama* v. *United States, supra* (p. 230).

"shall not make public * * * the results of or any facts ascertained during any such * * * investigation; * * *"[13]

Despite these clearly defined restrictions on publicity, designed and spelled out to protect innocent people, to prevent the destroying of reputation and creating prejudice to a fair hearing, other statements not appearing in the moving papers appeared in the public press emanating from Petitioner's office (Resp. R. 4a). These press releases are in violation of Canon 20 of the American Bar Association Canons of Professional Ethics proscribing trying cases in the newspaper to the prejudice of respondents rights and the administration of justice.

Errors in Petitioner's Reasons for Writ.

A. Petitioner claims the issue presented is whether "scalping" is a violation of the statute involved. Nowhere in the moving papers is the word "scalping" mentioned. No rule of the S. E. C. mentions or defines the word; no proof was offered as to its meaning. The word is misused by petitioner, adopted without proof of meaning by the minority, and has no relation to this case.[14]

B. The decision below does not hinge upon statutory construction but on the failure of petitioner's proof to warrant on the facts of this case a preliminary injunction prior to a trial on the merits. However, the statute is a

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[13] The restriction on publicity may explain the resort to Court action, instead of administrative proceedings.

[14] Scalping has no sinister connotation. It merely means trading in quick succession for a small trading profit of a fraction or a point or two. *Munn's Encyclopedia of Banking and Finance*, p. 667.

penal one[15] and may not be extended beyond its terms.[16] Where statutes are penal, fraud cannot have one meaning for the Securities and Exchange Commission and another for the Department of Justice.[17]

C. The opinion below does not sanction any low business practice, violation of the statute, breach of fiduciary duty, nor is it in conflict with decisions of any other circuit.

Petitioner and the minority opinion ignore the finding of good faith and lack of intent to defraud, and the facts.

Respondents, after careful research and finding a stock undervalued, decided to recommend it to subscribers for long capital gain. Respondents then, in the instances cited, purchased a small number of shares. An investment adviser has the right to use his own work product to trade in an open market (barring some regulation to the contrary). Common sense would dictate that a subscriber would expect an adviser to do so.

The subscriber's purchase is not contrary to advice he plans to give—to recommend purchase for a capital gain. (If he purchased none, by petitioner's theory he might be suspect for not following his advice.) The point of departure here is that the adviser did not hold for a long-term gain. There is no legal or moral obligation that an adviser buy every stock he recommends and hold it for as long as he recommends at the hazard of being accused of fraud.

On oral argument petitioner conceded that there would be no fraud if the adviser followed exactly his recomendation, i.e., buy and hold for six months. Can it turn fraudulent if the adviser buys but holds for five months and 29

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[15] T15 USC 80 b-17.

[16] *United States* v. *Resnick*, 299 U. S. 207 (1936).

[17] *Federal Communications Commission* v. *American Broadcasting Co. Inc.*, 347 U. S. 284, 296 (1953).

days instead of six months? Or if he holds only for four months, two months, one month, or ten days? Obviously not. The crucial test is, was the advice honest and given in good faith with honest intent, i.e., that subscribers have the opportunity for long-term gain.

The soundness of the advice is not questioned; in fact, subscribers could have profited 34-84% on the recommendations.

Petitioner, conceding the advice was honest, urges that it was not disinterested because respondents bought some shares. But the uncontradicted facts are that the adviser researched and decided to recommend the stock prior to his own purchases. The stock would have been recommended regardless of whether respondents purchased.

The suggestion that respondents' recommendation was motivated by his own small trade and small profit, compared to the profit the subscribers, following the advice, could have had, is contrary to and a jaundiced view of the facts. The advice was not motivated by self-interest, but given in the course of business in the belief subscribers could profit thereby, which proved one hundred per cent correct.

There was no proof that the respondents' transactions interfered with or were adverse to the subscribers' opportunity for capital gain.

There was no breach of fiduciary duty. The obligation owed to subscribers was to give honest advice with good intent and this was done and was unmarred by the adviser, too, making a profit on his own research in a manner which in no way interfered with subscribers' possibilities of profit.

The respondents' transactions were not a material fact as to whether his advice was honest or whether subscribers could make a maximum profit therefrom. Respondents' transactions were his private affair which it would not dawn on one of good conscience to disclose in the absence

of any known rule or regulation of the S. E. C. requiring disclosure.

The accepted form of disclosure, when broker-dealers trade in a recommended stock, that they "may from time to time hold a position in the securities mentioned herein" can hardly be the difference between integrity and fraud (Resp. R, 6a). This meaningless phrase which the SEC considers sanctifying is worship of "disclosure" as a shibboleth—of form to substance.

No disclosure can make a dishonest transaction honest, nor lack of disclosure make an honest one dishonest.[18]

The non-disclosure to constitute fraud must not only be as to a material fact but it must be with intent to deceive.[19]

The New York Stock Exchange Guide provides:

> "If a member organization recommends a security in which it has a *substantial position* * * * it should consider whether such interest * * * ought to be stated in the material."[20] (Emphasis supplied.)

The sales of stock by Capital Gains were not in conflict with the interest of subscribers. The sales occurred five to fourteen days after the report was issued, so that the subscriber had ample opportunity to buy for long-term

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[18] *Epstein* v. *United States*, 174 F. 2d 754, 768 (6th, 1949).

[19] *Otis & Co.* v. *Securities and Exchange Commission*, 160 F. 2d 579, 582 (6th, 1939).

[20] New York Stock Exchange Guide, Section 2474 A.10. Petitioner's brief (p. 18) refers to a newspaper description of New York Stock Exchange Educational Circular No. 170 which inadequately describes the release. The Stock Exchange rule has not been altered. The head of the Stock Exchange so testified before the SEC and said that need for further disclosure was "debatable." "New York Herald Tribune", 5-26-62. Circular 170 reported censure of a firm where partners, employees and their families unloaded stock on recommending it. The SEC stated "no misconduct is charged" and took no action. "New York Times", 5-23-62.

gains prior thereto. Certainly the transactions were not in conflict with the long-term capital gains of the subscriber in the respective stock.

There was no element of manipulation in the respondents' transactions. Not only was there no proof that the reports in fact influenced the market, but, assuming they had, a correct report issued in the course of business to the effect that a stock is undervalued, even if it causes a market to rise, is not manipulative. Manipulation means to artificially raise prices.[21] Every corporate report showing an increase of profits or prospects thereof, however true, if it causes a market to rise could be considered manipulative. But in any case the manipulation would have to be one that deceived or defrauded the subscriber, which is patently not the case.

Contrary to the suggestion that Capital Gains was seeking to cause a rise in the market, clients had been specifically reminded not to be in haste in buying thereby disturbing the market (R. 25-26, 34).

No fraud or deceit has been shown and what really is troubling the petitioner is not that a fraud has been perpetrated on any subscriber but that the respondent has also in some instances made a profit on his own work product.

A distinct example of the unclear thinking of petitioner is the instance of Chock Full O'Nuts. There the respondents had never recommended that any subscriber buy the stock and had no knowledge of whether any subscriber owned the stock (R. 21, 22). The bulletin did not recommend the sale, nor the short sale. It was a comparative study of the current value of Chock Full O'Nuts and Frank

[21] See Securities and Exchange Act of 1934, 15 USC 78 i,j; and Rules thereunder.

G. Shattuck Co. (Schrafft's), pointing out that the latter offered far greater chance of appreciation and recommending the purchase of Shattuck (R. 21, 22, 35, 36).

On Shattuck the subscribers had an opportunity for profit, on the correct prediction of the adviser, to the extent of 50% in two months and 84% on a long-term gain or six-month period. From this state of facts it is obvious that there could be no fraud or deceit upon a subscriber because of respondents' transaction.

D. The decision below does not conflict with the decision of any other circuit. The petitioner cites *Torr, Charles Hughes, Arleen Hughes, Archer* and *Todd* as conflicting and indistinguishable. The cases involved different statutes and are as different as night and day.

In *Torr,* a preliminary injunction was denied. Torr was engaged to dispose of 47,000 shares of stock on which a man had an option at a given price and Torr was to receive one-third of the profits. It was necessary to raise the price of the stock on the Exchange in order for Torr to profit, and the higher the price was raised the more Torr profited. To accomplish this, Torr paid salesmen throughout the country to urge the purchase of stock on the market without disclosing to anyone that his motive and intent for doing it was to raise the price of stock so that Torr could profit. The deception is clear.

Charles Hughes involved a review of an SEC order of revocation of a broker-dealer registration. There was direct selling of stock to the customers without disclosing a mark-up of 16 to 40% over the price at which the customer could have bought on the market. The fraud is clear.

Arleen Hughes was a review of an SEC revocation of the broker-dealer's registration where defendant had been repeatedly warned by the SEC against her course of con-

duct and refused to stop. She sold securities directly to customers substantially above market prices without disclosure.[22] The fraud is glaring.

Archer involved the revocation of a broker-dealer license for a false registration statement and fraud in over-the-counter transactions where he deviated from the market price to his personal advantage without disclosure. The fraud was clear.

In *Securities and Exchange Commission v. Frank Payson Todd,* on the SEC statement of the case (p. 17) it would seem clearly deceitful for Todd was recommending one group of clients to buy a stock and at the same time was selling out the stock in another group of clients' accounts. He was deceiving one or the other group.[23]

The distinction between the case at bar and the foregoing cases is obvious. In the case at bar there has been no fraud or deceit. The adviser gave sound, unbiased, profitable advice to the subscriber.

Conclusion.

There was no violation of the statute nor need for a preliminary injunction which was rendered moot before the case was commenced by the respondents' ceasing to purchase stock, before recommendation and his willingness to conform as to trading, not trading, or any form of dis-

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[22] The defendant was readmitted to registration as a broker-dealer, 30 SEC 390, 1949.

[23] Shortly after defendant consented to an injunction it was vacated at his request (and without objection by the Commission) in order to permit a trial on the merits and eventually the Commission agreed to a dismissal of the action when it appeared that the probable facts would not support an injunction (Loos Securities Regulation Vol. 3, 2d Ed., p. 1516).

closure the SEC wished so that at best this is much ado about nothing, and, at worst, an unworthy persecution.

The petition for a writ should be dismissed.

Respectfully submitted,

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